

**United States Department of Labor
Employees' Compensation Appeals Board**

L.D., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
PETERSON AIR FORCE BASE, CO, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 15-1102
Issued: January 20, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

On April 17, 2015 appellant filed a timely appeal from a November 17, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly determined the amount of an overpayment of compensation based on an incorrect pay rate was \$109,282.04; (2) whether OWCP properly found an overpayment of \$24,396.80 for life insurance premium deductions; (3) whether OWCP properly denied waiver of the overpayments; and (4) whether OWCP properly determined the recovery of the overpayment from continuing compensation.

FACTUAL HISTORY

The case was before the Board on a prior appeal. The case involves two overpayments of compensation. OWCP found that there was an overpayment of \$170,917.82 from April 14, 2003

¹ 5 U.S.C. § 8101 *et seq.*

to December 18, 2010 due to compensation paid based on an incorrect pay rate.² It had used an annual pay rate of \$87,289.00, for a General Services (GS), Step 10 full-time employee as of January 2003. The Board found that the correct pay rate under 5 U.S.C. § 8114 was for 32 hours per week at a fixed rate of pay.³ The record indicated that as of January 2003 appellant was a part-time employee working 32 hours per week. Under 5 U.S.C. § 8114(d)(1)(A), if an employee worked in the employment in which he was employed at the time of injury for substantially the whole year preceding the injury, and the rate of pay is fixed, the average annual earnings are the annual rate of pay. Since appellant was erroneously paid compensation from April 14, 2003 to December 18, 2010 based on the pay rate for a full-time employee, an overpayment of compensation was created. As to the amount of the overpayment, however, the Board found that OWCP had failed to properly explain how the amount was calculated. The case was remanded for proper findings as to the amount of the overpayment.

OWCP found an additional overpayment of \$15,024.67 was created based on the failure to properly deduct postretirement basic life insurance (PRBLI) premiums. The documentation in the record indicated that as of June 26, 2003 appellant was responsible for PRBLI deductions.⁴ The Board affirmed a finding that the PRBLI premiums had not been properly deducted from appellant's compensation, but with respect to the amount, OWCP again had failed to provide proper findings and the case was remanded to OWCP.

The Board addressed the issue of waiver, noting that the evidence of record did not establish that recovery would defeat the purpose of FECA or be against equity and good conscience. The Board found that on March 14, 2011 appellant had submitted financial information, including an OWCP-20 form in which he reported \$10,382.10 in monthly income and \$9,093.82 in expenses. As to assets, appellant reported \$16,902.39 in checking and savings bank accounts. Based upon this financial information, the Board also affirmed recovery of the overpayment by deducting \$1,500.00 from continuing compensation.

Appellant filed a petition for reconsideration of the Board's decision. In an order dated July 21, 2014, the Board found that there was no error with respect to the Board's analysis of the pay rate issue.⁵ The Board found that appellant's argument that the definition of "year" and "substantially the whole year" should be based on the number of hours worked, was not supported by FECA or Board precedent. The Board modified the prior decision to reflect that the case was not in posture for decision with respect to amount of overpayment, denial of waiver, and recovery.

² OWCP accepted bilateral carpal tunnel syndrome and appellant stopped working on April 14, 2003. The facts of the case, as outlined in the prior decision are hereby incorporated by reference.

³ Docket No. 12-1408 (issued April 26, 2013).

⁴ The record contains the Office of Personnel Management Form SF 2818 electing the no reduction option for postretirement life insurance coverage signed by appellant on February 3, 2003.

⁵ Docket No. 12-1408 (issued July 21, 2014).

The record indicates that appellant continued to submit statements arguing that his pay rate should not be determined under 5 U.S.C. § 8114(d)(1)(A). Appellant again argued that he did not feel he worked for substantially the whole year since he worked 32 hours per week.

By decision dated November 4, 2014, OWCP found that the overpayment based on an incorrect pay rate was \$109,282.04. It stated that its original calculations as to the amount were erroneous, and provided new calculations.⁶ According to OWCP, appellant had been paid \$546,248.85 in gross compensation from April 14, 2003 to December 18, 2010. Based on a 32-hour per week pay rate of \$1,343.06, he was entitled to \$436,966.81, creating an overpayment of \$109,282.04. As to deductions for life insurance, OWCP found that the overpayment was \$13,764.00.⁷ It found that \$13,942.20 should have been deducted for PRBLI, but only \$178.20 had been deducted. In addition, OWCP reviewed the waiver issue and found that, based on the financial information submitted in 2011, appellant was not entitled to waiver. It found periodic deductions of \$1,384.62 would continue from his continuing compensation.

On November 7, 2014 OWCP received information from the Office of Personnel Management (OPM) regarding the final base salary for the Federal Employees' Group Life Insurance (FEGLI) coverage. OPM indicated that the final base salary was \$87,289.00

On November 17, 2014 OWCP issued a decision modifying the November 4, 2014 decision with respect to the overpayment amount resulting from life insurance deductions. It noted that it had received new information from OPM, and that the prior calculations had been based on a base salary of \$69,831.00. OWCP stated that the "final salary" was \$87,289.00 on which to base calculations for life insurance deductions. For the period April 14, 2003 to December 18, 2010, it deducted \$2,349.00 for BLI premiums, \$29,269.10 for OLI premiums, and \$178.20 for PRBLI premiums. According to OWCP, they should have deducted \$0 for BLI, \$29,484.95 for OLI, and \$17,427.75 for PRBLI. Noting that appellant had been refunded \$7,363.10 for OLI premiums, OWCP found an overpayment of \$7,147.25 was created for OLI premiums,⁸ and \$17,249.55 for PRBLI premiums (\$17,427.75 minus \$178.20).

LEGAL PRECEDENT -- ISSUE 1

Section 8114(d) of FECA provides:

"Average annual earnings are determined as follows --

(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately

⁶ OWCP had issued a decision dated October 30, 2014, but stated that the November 4, 2014 decision superseded the October 30, 2014 decision.

⁷ OWCP indicated that on March 4, 2011 it had refunded \$2,349.00 for over-deduction of basic life insurance (BLI) premiums, and \$7,363.10 for over deduction of optional life insurance (OLI) premiums. The record confirms that appellant received a payment dated March 4, 2011 of \$9,712.10.

⁸ OWCP subtracted \$215.85 from the refund amount of \$7,363.10.

preceding the injury and the employment was in a position for which an annual rate of pay --

(A) was fixed, the average annual earnings are the annual rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week, and 260 if employed on the basis of a 5-day week.”

It is well established that a claimant is entitled to a decision that contains adequate findings of fact and a statement of reasons.⁹

ANALYSIS -- ISSUE 1

On the prior appeal, the Board affirmed the fact of overpayment in this case. The Board found that the proper pay rate for compensation purposes should be based on a fixed pay rate for 32 hours per week under 5 U.S.C. § 8114(d)(1)(A). The issue is whether OWCP properly determined the amount of the overpayment based on an incorrect pay rate.

OWCP indicated that appellant was paid \$546,248.85 in gross wage-loss compensation from April 14, 2003 to December 18, 2010. It documented the amount of compensation for each compensation payment commencing April 14, 2003. In addition, OWCP calculated that appellant should have received \$436,966.81 for this period using the correct pay rate of \$1,343.06 per week. The record contains detailed calculations as to the compensation appellant should have received for April 14 to 30 and May 1, 2003 to January 24 and 25, to September 4 and 5, 2004 to February 19 and 20, 2005 to August 29 and 30, 2009 to December 18, 2010. There was no contrary evidence presented. As appellant should have received \$436,966.81 during this period, an overpayment of \$109,282.04 was created. The Board finds that OWCP properly determined an overpayment of \$109,282.04 based on an incorrect pay rate.

On appeal, appellant again argues that he believes that his pay rate was not properly determined by OWCP. The Board has addressed the issue in its prior decision and order. The proper pay rate was determined under 5 U.S.C. § 8114(d)(1)(A) based on a 32-hour workweek. OWCP determined appellant’s pay rate was \$1,346.06 per week and no contrary evidence was presented. Based on the evidence of record, an overpayment of \$109,282.04 was created.

⁹ See *M.M.*, Docket No. 14-1166 (issued December 1, 2014); 20 C.F.R. § 10.126.

LEGAL PRECEDENT -- ISSUE 2

Under the FEGLI program, most civilian employees of the federal government are eligible to participate in basic life insurance and one or more of the options.¹⁰ The coverage for basic life is effective unless waived¹¹ and premiums for basic and optional life coverages are withheld from the employee's pay.¹²

FECA and its implementing regulations provide that an employee entitled to disability compensation benefits may continue his or her basic life insurance coverage without cost under certain circumstances¹³ and may also retain the optional life insurance.¹⁴ At separation from the employing establishment, the FEGLI insurance will either terminate or be continued under "compensation" status.¹⁵ If the compensation chooses to continue BLI and OLI coverage, the schedule of deductions made while the compensation was an employee will be used to withhold premiums from his or her compensation payments.¹⁶ Thus, while receiving disability compensation in lieu of retirement benefits, the former employee is responsible for all insurance premiums.¹⁷

ANALYSIS -- ISSUE 2

The November 17, 2014 decision finalized the findings with respect to an overpayment based on life insurance deductions. The decision modified its prior findings and now found that it should have deducted, from April 14, 2003 to December 18, 2010, PRBLI premiums of \$17,427.75 and \$29,484.95 in OLI premiums. The prior calculations indicated that \$15,064.27 should have been deducted for PRBLI and \$21,906.00 in OLI.

The only explanation provided for these new calculations were OWCP's finding that the new information from OPM established a final salary of \$87,289.00 on which to base deductions. OWCP stated that it had previously used \$69,831.00. This is not an adequate explanation in the present case. As the above discussion illustrates, \$87,289.00 represented the pay rate for a GS, Step 10 as of January 2003. This was specifically the pay rate that OWCP found was an incorrect pay rate for compensation purposes, and the Board has affirmed this finding. The basis for the overpayment discussed in the first issue was that OWCP had incorrectly used a pay rate of \$87,289.00. OWCP must clearly explain to appellant why a "final

¹⁰ 5 C.F.R. § 870.201.

¹¹ *Id.* at § 870.204(a).

¹² *Id.* at § 870.401(a).

¹³ *Id.* at § 870.701, subpart G.

¹⁴ *Id.* at § 871.201, subpart B; 8702.201, subpart B; 873.203, subpart B.

¹⁵ *Id.* at § 870.501.

¹⁶ *Id.* at § 872.410, subpart D.

¹⁷ *Scherrie L. Stanley*, 53 ECAB 433 (2002).

salary” of \$87,289.00 is now the appropriate pay rate on which to base deductions for PRBLI and OLI. If OPM uses a different method of calculating the pay rate used for deduction of life insurance premiums, this should be discussed and proper findings made.

Appellant is entitled to a decision with findings of fact and a statement of reasons.¹⁸ The case will be remanded to OWCP for proper findings as to the life insurance deductions in this case. After such further development as is necessary, OWCP should issue an appropriate decision.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of FECA¹⁹ provides: “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [FECA] or would be against equity and good conscience.”²⁰ Since OWCP found appellant to be without fault in the creation of the overpayment, OWCP may only recover the overpayment if recovery would neither defeat the purpose of FECA nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

According to section 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary “needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses,” and, also, if the beneficiary’s assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.²¹ For waiver under the “defeat the purpose” FECA standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the resource base.²²

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) the individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.

¹⁸ *Supra* note 9.

¹⁹ *Supra* note 1.

²⁰ 5 U.S.C. § 8129(b).

²¹ OWCP procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

²² *See Robert E. Wenzholz*, 38 ECAB 311 (1986).

ANALYSIS -- ISSUE 3

The only financial information in the record is that provided by appellant on March 14, 2011 which included \$10,382.10 in monthly income and \$9,093.82 in expenses. As to assets, appellant reported \$16,902.39 in checking and savings bank accounts. He had assets that exceeded the resource base, and no evidence that recovery would be against equity and good conscience was presented. Appellant has not submitted any additional financial evidence relevant to the waiver issue.²³ He may submit new relevant financial evidence and request waiver of the established overpayment.²⁴ As noted above, an overpayment of \$109,282.04 has been established, but the amount of an additional overpayment based on life insurance deductions has not been properly finalized. Based on the current overpayment amount and evidence, OWCP has properly denied waiver of recovery of this overpayment.

LEGAL PRECEDENT -- ISSUE 4

OWCP regulations provide:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship.”²⁵

ANALYSIS -- ISSUE 4

The Board also addressed the issue of recovery from continuing compensation payments in its prior decision. It was noted that the hearing representative provided a detailed review of appellant’s financial circumstances in determining that the overpayment could be recovered by deducting \$1,500.00 from continuing compensation. The November 4, 2014 decision indicated that the periodic deduction would be \$1,384.62. Again, no additional relevant financial information has been submitted indicating a change in appellant’s financial circumstances. Based on the evidence of record, OWCP has properly determined the recovery of the overpayment from continuing compensation. The Board notes that the amount of the overpayment regarding life insurance deductions must be properly finalized by OWCP, as discussed above.

²³ The record contains EN1032 reports from appellant dated August 20, 2012, August 16, 2013, and August 14, 2014. These reports provide information on employment activity, but do not discuss expenses or assets.

²⁴ See S.S., Docket No. 15-0958 (issued July 15, 2015).

²⁵ 20 C.F.R. § 10.441.

CONCLUSION

The Board finds that OWCP properly determined that an overpayment of \$109,282.04 was created based on an incorrect pay rate. As to an overpayment based on deductions for PRBLI and OLI, the case is remanded for a proper explanation as to the amount of the overpayment. The Board further finds that OWCP properly denied waiver of recovery of the \$109,282.04 overpayment and properly determined the recovery of that overpayment from continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 4, 2014 is affirmed with respect to an overpayment based on an incorrect pay rate. The November 17, 2014 decision is set aside and the case remanded for further action consistent with this decision of the Board.²⁶

Issued: January 20, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

²⁶ James A. Haynes participated in the original decision but was no longer a member of the Board effective November 16, 2015.